

employer, KB Complete Plumbing. That claim was settled on July 17, 2000, based upon a 10 percent whole body impairment of function rating given by orthopedic surgeon William O. Hopkins, M.D.

2. In his report of June 13, 2000, Dr. Hopkins noted that claimant had returned to his regular work activities but "has residual complaints of back pain, limited motion and occasional left leg pain but without tingling, numbness or weakness." Dr. Hopkins advised claimant "to seek a less demanding level of work activity."²

3. On September 1, 2000 claimant said he "was in a crawl space with a fellow employee repiping a house, and in the back part of the house there wasn't hardly any room to work. I got into some positions that were pretty stressful and uncomfortable, and I spent about four hours up in that situation trying to pipe the water heater, and had to crawl up underneath some other ductwork and some other obstacles to get to it. In the process, I hurt my back."³

4. Claimant sought authorized medical treatment from respondent and was sent initially to W. David Fretz, M.D., and later returned to Dr. Hopkins.

5. Dr. Hopkins attributes claimant's current low back problems and second surgery to his September 1, 2000 work-related accident.

6. Claimant was also examined by orthopedic surgeon David K. Ebelke, M.D. He noted an inconsistent history claimant had given Dr. Fretz, and opined:

Even if he did not develop the recurrent disc herniation while crawling under the house, in my opinion such a quick recurrence following his initial surgery (approximately six months) would indicate a substantial likelihood (50%) that this is secondary to his initial injury and the surgery that was performed for it. It's well known that disc surgery does not "fix" the disc, and I have generally felt that a recurrent disc herniation, if less than a year following the original surgery, should be substantially attributed to the original injury. . . . However, in many cases (possibly as many as 50%), there is no history of any specific injury that leads to the initial herniation or a recurrent disc herniation. That is, no specific trauma is required; it sometimes "just happens". It's therefore certainly possible that his crawling under the house had nothing to do with the development of the recurrent disc herniation. . . . I'm sorry I can't better clarify the issue of causation, but in this case, in order to be fair to both Mr. Schmidt and the insurance carrier, I cannot clearly

² Respondent's Exhibit A to the Transcript of March 13, 2001 Preliminary Hearing.

³ Transcript of March 13, 2001 Preliminary Hearing at 4.

support his contention that this was caused by working, but neither can I deny the possibility that work may have played a significant role here. A 50% apportionment seems fair to me.⁴

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.⁵ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁶

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁷ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.⁸ The Board finds that claimant suffered an aggravation of his preexisting condition on September 1, 2000 as alleged. This aggravation was caused by an intervening accident. Accordingly, this is a new accident and claimant's current condition is compensable as a new injury, not as a direct and natural consequence of the original November 4, 1999 work related injury.

The record shows that the surgery did not restore claimant's back to its full strength and stability. But claimant testified that he had no difficulty returning to regular duty work. Although respondent disputes this, claimant is in the best position to know. Claimant testified that he did not have any complaints of pain in his back immediately prior to this accident. Claimant further testified that he felt pain immediately after working in the cramped crawl space on the alleged date of accident. The Board finds claimant's testimony credible.

⁴ December 8, 2000 letter of David K. Ebelke, M.D., Respondent's Exhibit A to the Transcript of March 13, 2001 Preliminary Hearing.

⁵ K.S.A. 44-501(a); see also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

⁶ K.S.A. 44-508(g). See also In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

⁷ Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

⁸ Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). See also Bradford v. Boeing Military Airplanes, 22 Kan. App.2d 868, 924 P.2d 1263, rev. denied 261 Kan. 1082 (1996).

Based upon the record compiled to date, the Board finds the greater weight of the credible evidence supports the claimant's contentions. Therefore, the ALJ's decision to award preliminary benefits should be affirmed. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁹

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Steven J. Howard on March 14, 2001, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 2001.

BOARD MEMBER

c: Mark E. Kelley, Liberty, MO
Victor B. Finkelstein, Kansas City, MO
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director

⁹ K.S.A. 44-534a(a)(2).